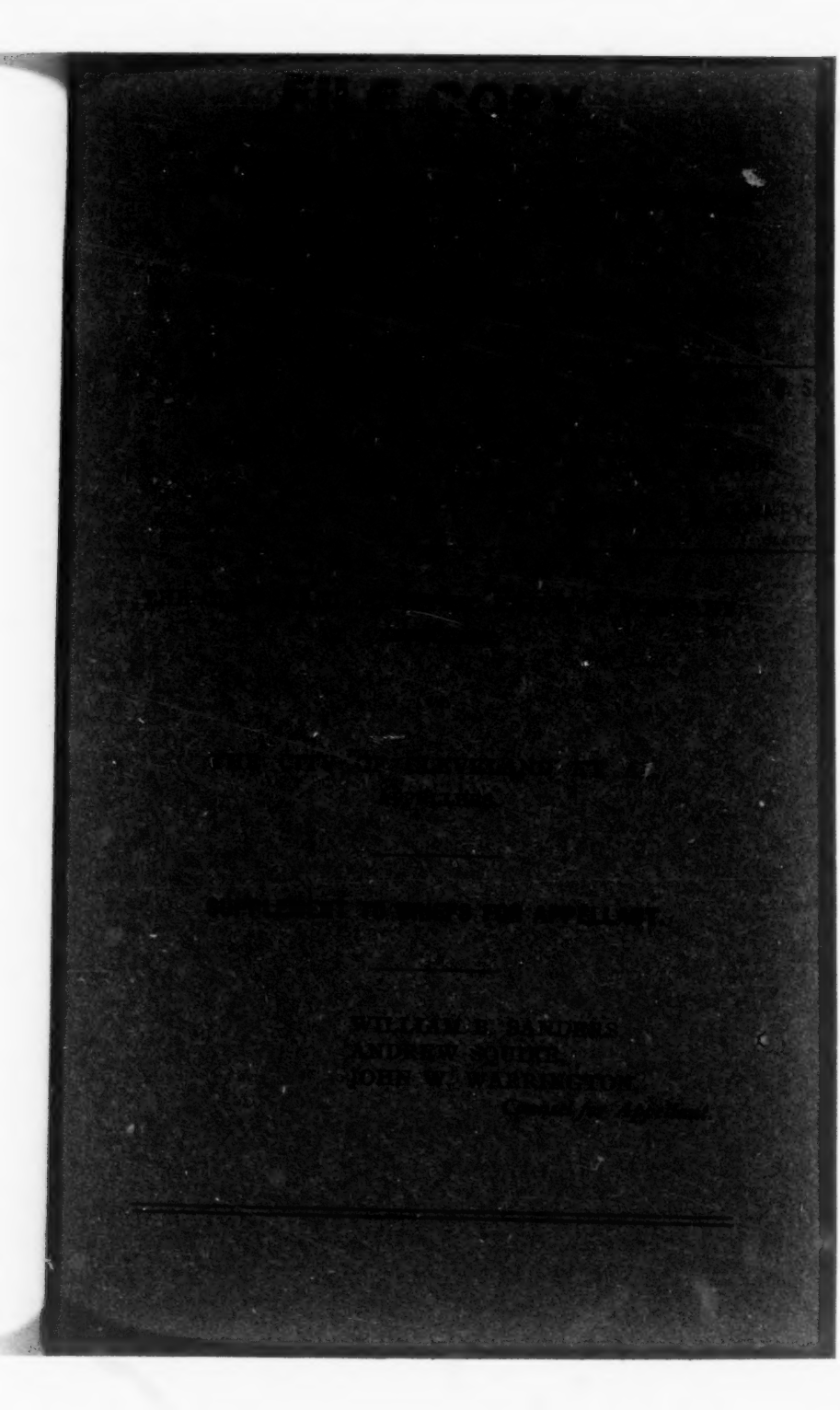

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 197.

THE CLEVELAND ELECTRIC RAILWAY COMPANY,
APPELLANT,

vs.

THE CITY OF CLEVELAND ET AL.,
APPELLEES.

SUPPLEMENT TO BRIEFS FOR APPELLANT.

In view of the plenary powers residing in city councils to renew street railway grants for not more than twenty-five years and to fix the terms and conditions upon which such railways may be constructed, operated and extended, what difference in legal effect, as regards the exercise of these statutory powers, is there between—

(1) **A grant in form permissive to operate existing street railway tracks for a definite period of time, extending beyond the term of the old grant, and**

(2) **A grant to extend existing tracks subject to a covenant in form imperative to operate both the existing and extension**

tracks as an entirety, the extension grant being also for a longer period of time than the old grant had to run?

If we may be permitted to do so at the present stage of this cause, we should like to submit the following remarks upon the above question.

Our aim is respectfully to endeavor to meet some questions that were stated from the bench during the oral argument. As we understood those questions, while they assumed that there is no particular form of expression prescribed for exercising the powers of city councils to renew street railway grants or to fix the terms and conditions upon which such railways may be constructed, operated or extended, yet it is due to the members of council and the mayor that the ordinances adduced in evidence should by their language show that the members when adopting, and the mayor when approving the ordinance, consciously exercised those statutory powers. We may concede that this is in accord with familiar decisions of this court. The central idea of those decisions is, we think, that while it is true that public grants in order to be valid must be expressed in clear and unambiguous language, nevertheless, since different words are employed by different public bodies in making such grants, their true intent must be and in fact is ascertained by ordinary processes of reasoning and interpretation. This is apparent from the very processes of reasoning adopted in reaching the conclusions announced in those decisions; indeed, it is inevitable.

We take it that in view alone of the cases which have been recently decided by this court between the parties to this cause, it will not be disputed, certainly not successfully, that a municipal grant in form permissive, authorizing the use and operation of existing street railroad tracks for a definite period and extending beyond the term of the old grant, will upon acceptance be treated as a valid exercise of the statutory power to prolong the old existing grant in point of time. If we are right in this, we may turn without further delay to a consideration of

the second part of the question stated at the beginning of this brief.

This question, it will be recalled, grew out of a claim of counsel in oral argument respecting the meaning of an ordinance passed September 2, 1896. (*Sup't to Rec. p. 309*). That ordinance granted to appellant *"permission to extend its line of railway"* etc. subject to certain requirements, which may fairly be called conditions, imposed upon appellant. One of these provides (Sec. 4, p. 310 Ibid):

"Said extension shall be operated as a part of the Euclid avenue main line of said company; and said company shall operate on said extension through cars to and from the Public Square, under a ten-minute schedule or headway between the hours of 6 a. m. and 8 p. m. and under a fifteen-minute schedule or headway between the hours of 8 p. m. and 11 p. m."

Again, it is provided (Sec. 13, p. 312 Ibid):

"This grant shall expire July 1, 1914".

At the end of the ordinance, *on page 313* following, it appears that after this ordinance was finally passed by the council, it was *"approved by the Mayor"*.

It will be remembered that both defendants in error admit that the grant of the Euclid Avenue main line will not in any event expire prior to July 13, 1913. The problem then is whether the powers of the council referred to in the question under discussion, were fairly and reasonably so exercised by the passage of the extension ordinance just alluded to, as to extend the term of the grant of the main line from July 13, 1913 to July 1, 1914, and so make the old and new grants coincident in date of expiration. Are not the words of the extension ordinance open to interpretation on a question like this?

Plainly the granting clause is couched in the ordinary language employed for making extension grants. This is abundantly proved by a comparison merely of the extension ordinance with the other ordinances in the record, which are conceded to have operated to authorize extensions to be made

of the tracks involved. The concession made over and over again by our adversaries, that the grant for the main line extends to July 13, 1913, ought logically to compel the further admission that *the members of the city council* and *the mayor* of the city of Cleveland were, when they adopted and approved the extension ordinance, cognizant of this date of expiration. That date had been fixed in 1888. Not to charge those officials with such knowledge is to impute to them a state of ignorance totally inconsistent with any official intelligence at all.

The ultimate inquiry then is whether we may fairly ascribe to those officials, the members of council and the mayor, the further knowledge that the extension ordinance contained a requirement that both the extension and the main line should be operated in the way specified for the additional period of time to intervene between July 13, 1913 and July 1, 1914, and whether they should reasonably be presumed to have meant to exercise the powers confessedly within their control and discretion necessary to enable the company to fulfill that requirement. In order to meet this inquiry, as it seems to us, it is only necessary to read the language of the requirement or covenant above quoted, in connection with the rest of the ordinance. Manifestly, the granting clause and this covenant must be construed together; indeed, the ordinance must be construed as a whole.

The extension "shall be operated as a part of the Euclid Avenue main line" with "through cars to and from the Public Square", according to a fixed headway. Surely no doubt or ambiguity can be fairly suggested as to the true meaning of this language. The extension must be so operated *as a part* of the main line. The extension and the main line were thus made an entirety, and a specific mode was thus prescribed for operating both as an entirety. The duty so imposed is imperative, no matter whether we call the provision a requirement, condition or covenant. The duty so imposed and the obligation so undertaken, were and are in their nature and essence continuing. The grant was made to continue until July 1, 1914; and

the duty and obligation so imposed and undertaken were indissolubly joined to the grant. Such a grant cannot be measured either in substance or time, without including both the duty and obligation to operate the extension and main line as a unit. The evident purpose was to secure a continuous car-service from the west terminus of the main line to the east terminus of the extension; and to continue such service throughout the life of the extension grant.

This is the plain and ordinary import of the language of the ordinance. There is not an ambiguous word or sentence. It is a clear and simple permission to the company to construct an extension, on condition that it should operate it and the main line together in a particular way. There is no limitation imposed as to duration of enjoyment of the grant or performance of the condition, except only the life of the extension grant. What rule of interpretation then will avail for introducing a shorter limitation as to the condition, any more than as to the grant? The condition is part of the grant. Why should any date of expiration have been named in the extension ordinance at all, if it was not intended that this through car-service should continue to that date? Both the extension grant and the obligation respecting the through car-service would have ended with the expiration of the grant for the main line, if no date had been specified in the extension ordinance.

Can it be true, in view of all this, that the councilmen and the mayor did not at the time know that they were authorizing an extension of tracks to be made and were requiring the operation both of those tracks and the tracks of the main line until the date fixed by the extension ordinance? How could they expect this through car-service to be given and continued between the Public Square and the end of the extension on Euclid Heights, without consciously giving the opportunity so to do? The very words of their ordinance specified the extension and the main line, and required the through car-service to be given over both. They were residents of the city, which they were so representing. They were familiar with the local-

ity and with the car-service needed. The intelligence that is ordinarily presumed to reside in a local legislative body, was augmented by that of the mayor of the city. The mayor possessed the veto power, and it is certainly not a violent presumption to accord to him an intelligent understanding of his exercise of that power. Indeed, it is not conceivable that these officials did not understand a plain and simple subject of legislation like this.

It is to be observed that there is no allegation of fraud or bad faith in the answer of either of the defendants in error. No issue of this character is presented by the pleadings. Good faith then of these city officials respecting the consideration and adoption and approval of this ordinance, must by every presumption and rule of law be accorded to their action. The ordinance has been in existence for more than ten years. It would therefore be an unusual and strange result to deny to the ordinance the plain meaning of its words, upon any theory of lack of intelligence or understanding on the part of the city officials.

What we have said applies equally to the theory recently expressed in a decision of this court, that legislative grants "are usually prepared by those interested in them"; for we but repeat when we affirm, that no person, official or otherwise, could have failed to observe the condition requiring operation of the main line and extension as an entirety, with through cars, under the grant expressly made to continue until July 1, 1914, without being distinctly impressed with the fact that the main line would have to be maintained until that date.

If we are at all right thus far, it follows that the true answer to the question stated at the beginning of this argument is, that there is no difference in legal effect between the two grants there attempted briefly to be described. If there be any difference between such grants, the second one is stronger than the first. The first is potential; the second is imperative. It is enough, however, to show that they are the same. Each involves the exercise of the renewal power, to say nothing of

the other statutory powers mentioned; for otherwise it would have to be held that the act really done by the council was invalid, despite the express statutory power to do it. But we said all we wish to express in this regard in our former briefs.

If it should be suggested that the ordinance under discussion is not relevant to the present case, a conclusive answer will be found in our contention made both in the briefs and oral argument, that the expiration of the Garden Street branch was made coincident with that of the main line, no matter whether the Garden Street branch be considered as an extension of the main line or as an independent line. In either case, the Euclid Heights extension ordinance is germane; because, as we insist, it prolongs the grant for the main line until July 1, 1914, and so carries with it the grant of the Garden Street branch. We are entitled to have the question of expiration of the grant for this branch considered in connection with the expiration fixed for the grant of the main line. We are entitled to this independently of all other questions presented and argued in this cause; for, after all, the Euclid Avenue main line and the Garden Street branch have been linked together so often and in so many ways under the city ordinances and resolutions, that the expiration of the grant of either one cannot be determined without considering the term of the other.

Respectfully submitted.

WILLIAM B. SANDERS,
JOHN W. WARRINGTON,
Of Counsel for Appellant

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In the Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 197.

THE CLEVELAND ELECTRIC RAILWAY COMPANY,

Appellant,

vs.

THE CITY OF CLEVELAND

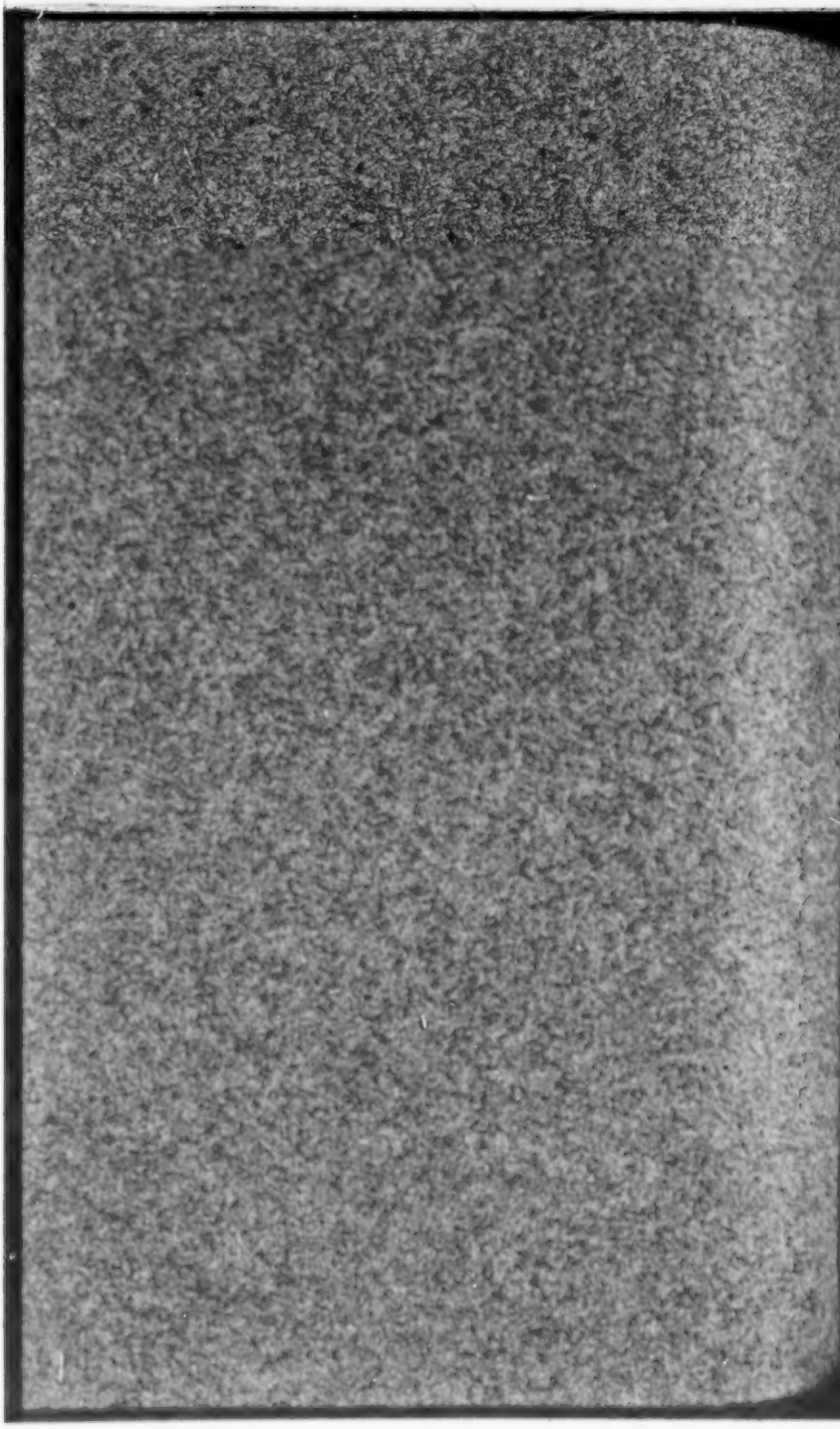
AND

THE FOREST CITY RAILWAY COMPANY,

Appellees.

Affidavit for Appellees
on
Motion of Appellant for Injunction.

NEWTON D. BAKER
D. C. WESTENHAVER,
Counsel for Appellees.



In the Supreme Court of the United States.

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Appellees.

Affidavit for Appellees on Motion of Appellant for Injunction.

NEWTON D. BAKER
D. C. WESTENHAVER,
Counsel for Appellees.

COMMERCIAL PRINTING & PUBLISHING CO.
CLEVELAND.

In the Supreme Court of the United States.

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vs.
THE CITY OF CLEVELAND
AND
THE FOREST CITY RAILWAY COMPANY,
Appellees.

UNITED STATES OF AMERICA
THE STATE OF OHIO } ss.
COUNTY OF CUYAHOGA

Affidavit.

Tom L. Johnson being first duly sworn according to law, says that he is Mayor of the City of Cleveland, one of the appellees in the above entitled cause; that, as appears by the Record in said cause, the Hon. R. W. Tayler did on the 4th day of december 1905 pass a final order in said cause, adjudicating and holding that the right of the complainant, The Cleveland Electric Railway Company, to maintain and operate its street railroad upon the street railway route described as commencing at the intersection of Prospect and Erie Streets in the City of Cleveland, thence southerly on, over and along Erie Street to Central Avenue; thence easterly on, over and along Central Avenue to Lincoln Avenue; also commencing at the intersection of Quincy Street with Willson

Avenue in said City; thence easterly on, over and along Quincy Street to Woodland Hills Avenue, expired on the 22nd day of March 1905, which decree was pursuant to an opinion delivered by said judge on the 24th day of April 1905, holding that the franchise to operate the Garden Street branch, including all of its extension and additional tracks, expired on said 22nd day of March 1905, which said Garden Street branch includes all the tracks of the complainant company in the streets enumerated in the final decree as passed and as hereinbefore referred to; and this affiant says that subsequent to the opinion delivered by the said Hon. R. W. Tayler, and about the 12th day of June 1905, this affiant, as Mayor, wrote and sent to The Cleveland Electric Railway Company the following letter:—

"June 12th, 1906.

THE CLEVELAND ELECTRIC RAILWAY COMPANY,
CLEVELAND, OHIO,

Gentlemen:—

Efforts to adjust the question of a renewal of your grants having proved futile and having been abandoned by you, I feel it my duty to take up the question of your continued operation of lines upon which the grants originally given by the City have expired. Several such cases exist, as you know, but by far the most important of them is the Central Avenue and Quincy Street line, where, as the Court has held, the Company is operating without right and under conditions as to fare which are far less liberal to the public than any recent ordinance of the counsel would warrant. During the pendency of the litigation involving the validity of grants made to the Forest City Railway Company, it would perhaps be inconvenient for the City to take up the question of a grant upon those lines to any other company, but as the President of your Company has admitted that this litigation, preventing as it does the operation of the lines in question

at three cent fare, is instigated by you and for your benefit, it ought not in justice to be permitted to work a prolongation of your exaction of a fare higher than others are willing to accept for the same service, nor should the City, by passing the expiration of your grants unnoticed, be put in the position of acquiescing in the conditions under which you operate. Of course the continued operation of the lines in question is important, and I have no doubt that you and the City authorities can arrive at some temporary arrangement which will accomplish that object and at the same time safeguard the City and those who use the cars.

To discuss such an arrangement I invite you, by such representatives as you may select, to attend a meeting in the Mayor's Office at 12 M. o'clock Monday, June 19th, 1905.

Very truly yours,

TOM L. JOHNSON,

Mayor."

and that thereafter Mr. Horace E. Andrews President of The Cleveland Electric Railway Company, and this affiant orally discussed the matters referred to in this letterat a public hearing in the office of the Mayor of the City of Cleveland, an agreement being reached which was evidenced by the following letter sent by The Cleveland Electric Railway Company, by Horace E. Andrews as President, on the 26th day of June 1905 to this affiant.

"HON. TOM L. JOHNSON,

Mayor.

Dear Sir:—

In accordance with our oral understanding, and in reply to your letter of June 12, 1905, we desire to say that inasmuch as the date of expiration of the franchise rights of this company in Central Avenue and Quincy Street is questioned and has not been finally passed upon by the courts, the company will

refund the net profits from the operation of its cars upon the portions of the streets in question, subsequent to March 22, 1905, provided that the Supreme Court of the United States shall hold that its rights expired on that date.

In determining what the net profits are in this period, there shall be deducted from the estimated gross earnings of the lines in the parts of streets above mentioned; the operating expenses, the taxes, the depreciation charges, and 6 per cent. interest upon the value of the physical property in any way used for or contributing to the service rendered upon said portions of lines.

By this statement we endeavor to insure the City that the company is not desirous of availing itself of profits from the operation of any line which it may not have any legal right to operate and that it will continue the service upon the portions of streets referred to without profit to itself beyond a reasonable interest upon the value of its property, if the Courts shall determine that its rights therein have expired. If the company's contention that its grants have not expired is maintained, it will, under this arrangement, suffer no loss. In either case entire justice will be done to both the City and the company.

If prior to final decree in the Supreme Court, an extension or renewal of grants be made by the City to this company for the lines of railway operated by it in Cleveland, this agreement on the part of the company is to become void and of no effect.

If this arrangement is made, it is understood that it is to be without prejudice to the right of the City or the company.

We have not attempted to prepare any resolution or ordinance for consideration by the City Council reciting the proposal herein made by us, believing

that such a resolution or ordinance should more properly be drawn by the City authorities.

THE CLEVELAND ELECTRIC RAILWAY CO.,
BY HORACE E. ANDREWS,
President."

This affiant says that thereupon he caused to be prepared and submitted to The Cleveland Electric Railway Company the following form of agreement:—

"*Whereas*, The Circuit Court of the United States for the Northern District of Ohio, Eastern Division, has decided that the right of The Cleveland Electric Railway Company to operate in Central Avenue and Quincy Street expired on the 22nd day of March 1905; and

Whereas, The Cleveland Electric Railway Company, claiming a longer right to operate in in said streets, is perfecting an appeal to the Supreme Court of the United States for a review of said question; and

Whereas, The right of the Forest City Railway Company to operate a street railroad in said streets is in litigation, and is undetermined; and

Whereas, it would cause inconvenience to the public and to The Cleveland Electric Railway Company to suspend the operation of cars in said streets pending the determination of the matters now in litigation; and,

Whereas, The Cleveland Electric Railway Company desires to continue the operation of its cars in said streets but is unwilling to take any advantage of said continued operation beyond the real date of the expiration of its franchise rights therein;

NOW, THEREFORE, this agreement, made on the 26th day of June, 1905, by and between the City

of Cleveland and The Cleveland Electric Railway Company WITNESSETH:

That for and in consideration of the City of Cleveland, by its legislative and administrative officers, refraining from interfering with the continued operation of the cars of The Cleveland Electric Railway Company in Central Avenue and Quincy Street, as said cars are now operated, The Cleveland Electric Railway Company, agrees that it will, immediately upon the signing of this agreement, report to the City of Cleveland the daily gross receipts upon the Central Avenue and Quincy Street lines separately, from the 22nd day of March 1905, to the 1st day of June 1905 and thereafter and until the final adjudication of the case of The Cleveland Electric Railway Company against the City of Cleveland, now pending in the Circuit Court of the United States for the Northern District of Ohio, Eastern Division, involving the right of said company to operate in said Central Avenue and Quincy Street, making similar reports monthly on the 1st day of each month, covering daily gross receipts for the preceding calender month, or part thereof, the gross receipts of the Quincy Street line being determined by taking 22.67 per cent. of the aggregate receipts of the Scoville-Pearl line as now operated. From the aggregate of gross receipts so reported, there shall be deducted for operating expenses, taxes and repairs, 60 per cent.; from the remaining 40 per cent. of said aggregate sum, there shall be deducted such a sum as will be for the time at the rate of two thousand, three hundred and sixty-three and sixteen one-hundredths dollars (2,363.16) per month, said sum of $2,363.16 being the interest for one month on $567,160, at the rate of 5 per cent. per annum, said sum of $567,160 being the value of 10.312 miles of single track, including all equipment, power houses, car stations and appliances, at the rate of $55,000.00 per mile; the net sum so remaining after making thedeductions herein before

provided, shall be due to the City of Cleveland from The Cleveland Electric Railway Company, in the event of a decision by the Supreme Court of the United States, that the right of the said company in said streets has expired, and said sum so fixed shall be payable to from The Cleveland Electric Railway Company to the City of Cleveland as follows:

Upon the date of such decision by the Supreme Court of the United States there shall be paid, with interest at 5 per cent. compounded semi-annually, the sum as herein provided for the time from the said 22nd day of March 1905, to the date of such decision, the monthly sums for the purpose of calculating interest being deemed due on the 10th day of each month for the preceding month; and thereafter on the 10th day of such succeeding month there shall be paid the amount determined to be due by the report for the preceeding month, all payments to be determined as herein provided. This agreement shall continue after such decision by the Supreme Court of the United States and until replaced by some other agreement between the parties hereto or until the Quincy Street and Central Avenue lines of street railway cease to be operated by The Cleveland Electric Railway Company. Either party shall have the right after the decision of the United States Supreme Court to terminate this agreement on 30 days' notice to the other.

Witness the signature of the City of Cleveland by the Mayor, thereunto duly authorized by resolution of the council, and the Cleveland Electric Railway Company by its president, thereunto duly authorized by resolution of the board of directors, affixed hereto on the day first above written."

This affiant says that after the preparation of said proposed form of agreement this affiant and Horace E. Andrews, Esq., President of The Cleveland Electric Railway

Company, met publicly in the Mayor's Office and discussed the terms of the said proposed agreement in an effort so to amend the same as to cause it to be satisfactory, but that The Cleveland Electric Railway Company, by its President, refused to suggest such amendments in the proposed form, or to propose any other form of agreement, and that as a result of said meeting the said The Cleveland Electric Railway Company refused to enter into any such agreement beyond an expression of willingness on its part to have an accounting when the decision of this cause in this court should be made upon a basis then to be determined, which this affiant then said was a mere agreement on the part of the said The Cleveland Electric Railway Company and the City to have a lawsuit, and would not then settle any basis for the continued occupancy of the streets in question by the said company should such occupancy subsequently be held to be without warrant of law.

This affiant says that the City of Cleveland and he, as the chief executive officer of said City, have at all times been willing to permit the complainant company to continue the operation of its cars in the streets in question under such safeguards as would insure a just recognition of the rights of the City and its people, either in a lower rate of fare, or by an accounting for the profits in excess of a fair return upon the actual investment pending the determination of this Court of the question raised by the appeal, and that this affiant believes the Council of the City of Cleveland is now willing to grant to the complainant company any additional facility or rights which it may require for the orderly and efficient operation of the various lines of street railway owned and operated by it, as to which the right of operation has not expired; and this affiant says that both before and since litigation began the Council of the City of Cleveland, while this affiant was Mayor thereof, have granted to the complainant company

many such rights to additional facilities and tracks. This affiant says that subsequent to the date of the passage of the ordinance exhibited in the Bill of Complaint in this action, attempting to grant to the Forest City Railway Company the renewal right to maintain and operate the existing street railroad in streets in controversy in this action, to-wit: on the 24th day of September 1906, the Council of the City of Cleveland passed an ordinance granting to the Forest City Railway Company the right to extend its existing street railroad by constructing the necessary tracks and appliances in said streets, which said last-mentioned ordinance this affiant says authorizes The Forest City Railway Company to construct, equip and operate an extension of its existing street railroad on all the streets and parts of streets as to which the rights of the complainant company were adjudged by the Hon. R. W. Tayler in the Circuit Court of the United States to have expired. That this affiant, after the maturity of the passage and acceptance of this ordinance by The Forest City Railway Company, was charged with the duty of putting said The Forest City Railway Company in possession of said streets, but that the complainant company continued to occupy all of said streets to the exclusion of the said Forest City Railway Company, and as has heretofore been shown without any agreement between it and the City of Cleveland as to its continued occupancy thereof, and without any other claim of right than that adjudged by the Circuit Court of the United States to have expired on the 22nd day of March 1905. This affiant says that he thereupon directed The Cleveland Electric Railway Company to cease operation of its cars upon a portion of Erie Street extending from Prospect Avenue to Central Avenue for the purpose of permitting The Forest City Railway Company to enter upon it and begin the necessary construction therein. The affiant says that the said portion of Erie Street was selected for the reason that all the lines of

cars operated by the complainant company, including the lines upon streets covered by this cause, could be conveniently operated without the use of the tracks in said portion of Erie Street, without inconvenience to the complainant or to the people of the City of Cleveland and without interrupting the operation of the cars of the complainant company even upon the streets and parts of streets as to which the Circuit Court of the United States, as hereinbefore shown, adjudged its rights to have expired.

This affiant further says that the action of the City of Cleveland in this behalf was not arbitrary or oppressive, but was in direct pursuance of the authority of said City conferred upon it by the laws of the State of Ohio, as recognized and sanctioned by the Circuit Court of the United States in its decree, and as stated by the Hon. R. W. Tayler in his opinion, which is the basis of said decree, the said Court saying, as appears in the Record of said cause, page 275,

> "The City has its rights in those streets which it can simply assert; * * * but it (the complainant) would not be entitled to any injunction against the City's proceeding to do such acts in Central Avenue and other streets along which this track is laid as they could do with respect to any other street upon which any other person has a structure, or was maintaining that which was there, without authority of law. Its rights there are the same as elsewhere."

This affiant further says that the complainant company, pending the determination of this appeal, is continuing to charge a cash fare of five cents and is selling eleven tickets, each ticket good for one fare, at fifty cents, while the ordinance of the 24th day of September 1906, to which this affiant has previously referred as granting to The Forest City Railway Company the right to construct and operate a street

railroad in said streets, limits the rate of fare to the maximum of three cents, and reserves the right to the Council under certain conditions to decrease said rate of fare, and to revoke and rescind the said grant so as to preserve to the City of Cleveland complete control over the operation of said street railroad in said streets.

And this affiant says that all the actions of the City of Cleveland complained of in the motion for a temporary injunction in this cause are regular and in pursuance of law. That they are not oppressive or arbitrary, but are an effort on the part of the constituted authorities of the said City both to perform their legal duty and to secure for the people of said City the advantages of the lowest rate of fare in their transportation facilities, and further this affiant saith not.

TOM L. JOHNSON.

Sworn to before me by the said Tom L. Johnson and by him subscribed in my presence this third day of November, A. D. 1906.

J. M. CRAWFORD
Notary Public within and for the County of Cuyahoga and State of Ohio.

[NOTARIAL SEAL]